Attorney-General for Ceylon v. *A. D. Silva* [1], their Lordships of the Privy Council said:

"All ostensible authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal."

In view of this authority, I hold that payment by the plaintiffs to Loke was not payment to the company.

I do not accept the plaintiffs' argument that if in fact no premium has been paid, the company cannot cancel the policy, for the company's rights vis-a-vis a defaulting policyholder cannot be less than their rights vis-a-vis a policyholder who has paid his premium. Nor do I accept the plaintiffs' argument that it is a condition of cancellation that a refund of the premium or a portion thereof must precede or accompany the notice to cancel. In my view the refund is only a consequence flowing from the act of cancellation. The words "and in such event [i.e., cancellation, the Company] will return" in the condition make this quite plain.

The letter dated 3rd May, 1961, from the company to the plaintiffs stated: "Unless the [premium] is remitted to us within seven (7) days from the date hereof, the policy will be cancelled....." The company's manager, D.W.1, said that on failure by the plaintiffs to remit within the stipulated seven days the policy was accordingly cancelled. This was done, according to the company's letter dated 6th July, 1961, to the plaintiffs' solicitor, on 11th May, 1961. To cancel this policy the company did two separate acts: first, they wrote the letter of 3rd May, 1961, and, secondly, they cancelled the policy on 11th May, 1961, after the expiry of the stipulated period. In my judgment this did not nullify the purported cancellation under condition 7 under which only a single act, namely, of sending the requisite notice was sufficient.

Accordingly I hold that by the time of the accident the policy had been effectively cancelled and was no longer in force.

For the above reasons I would dismiss this claim with costs.

Claim dismissed.

Solicitors: *Allen & Gledhill; George & Khoo.*

PUBLIC PROSECUTOR v. WONG YIN NAM

[A. Cr. J. (Ong J.) July 5, 1962]

[K.L. — Criminal Appeal No. 25 of 1962]

Gaming — Numbers lottery — Prevalence of — Hierarchy of operators — Main consideration — Common Gaming Houses Ordinance, 1953, s.4(1)(c).

Criminal Law and Procedure — Public lottery — Prevalence of offence — Sentence — Inadequacy.

The various types of offences as set out in paragraphs (a) to (h) of section 4(1) of the Common Gaming Houses Ordinance, 1953 cover an exceedingly wide range, and an amount of fine which is proper and reasonable for one may be inadequate or excessive for another. Nevertheless a fine of only 2% of the maximum is manifestly inadequate in the absence of special extenuating circumstances.

The position of the accused in the hierarchy of operators of the numbers lottery is the main consideration and not the smallness of the bets disclosed.

CRIMINAL APPEAL.

Mohamed Isa bin Ibrahim (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Ong J.: The appellant was, upon his own plea of guilty, convicted and fined the sum of $100 for an offence of assisting in carrying on a public lottery in contravention of section 4(1)(c) of the Common Gaming Houses Ordinance, No. 26 of 1953. The Public Prosecutor appeals against the inadequacy of the sentence on the grounds of prevalence of the offence, public scandal and the public interest. In my view, however, the only relevant consideration in this case is that the maximum punishment authorised by section 4(1) extends to imprisonment for 12 months or a fine of $5,000 or both. The various types of offences, as set out in paragraphs (a) to (h) cover an exceedingly wide range, and an amount of fine which is proper and reasonable for one may be inadequate or excessive for another. Each case therefore must be considered in the light of its own facts. Nevertheless, a fine of only 2 per cent of the maximum seems manifestly inadequate in the absence of special extenuating circumstances.

The numbers lottery is undoubtedly prevalent and also profitable. The position of the accused in the hierarchy of operators of this type of lottery is, in my view, the main consideration and not the smallness of the bets disclosed as the arrest might have occurred early in the day. The fact, however, that the appellant is a first offender, needs to be taken into account. Accordingly, I have increased the fine to $250 with a warning of the consequences of a second offence.

Sentence enhanced.

AIK TEONG TRADING CO. v. NATIONAL UNION FIRE INSURANCE CO.

[O.C.J. (Hepworth J.) July 9, 1962]

[Penang — Civil Suit No. 131 of 1961]

Insurance — "Warehouse to warehouse" policy of marine insurance — Loss of goods as a result of collision at sea — Waves caused by passing steamer — Whether loss due to perils insured against — Whether loss fortuitous — Institute Cargo Clauses (W.A.) of January 1, 1958 — Interpretation of — General principles of construction of marine insurance policies — Severance of contract — Whether value of goods lost can be calculated.

The plaintiffs were interested in a "warehouse to warehouse" policy of marine insurance made between the defendants and one C.T.C. of Bangkok whereby the defendants insured 7 cases of Siam Swallow Nests packed in the usual customary packings valued at $127,600 in the steamer *s.s. Hock Lee* at and from

Bangkok to Penang on terms printed in the said policy. The said goods were duly shipped in the said steamer at Bangkok for carriage to Penang under a bill of Lading dated April 9, 1961 and duly arrived at Penang. On April 14, 1961 the said 7 cases and other general merchandise were discharged from *s.s. Hock Lee* which was anchored at the Penang roads into a lighter for delivery to the plaintiffs. When the lighter was making way for other lighters to come alongside the said steamer it knocked against the side of the said steamer and this impact caused 3 of the 7 cases to fall into the sea and none of them could be retrieved. The plaintiffs now claim for the value of these cases, such loss being caused by one or more of the perils insured against under the said policy. It was argued for the plaintiffs that (i) it did not matter what caused the accident as anything short of wilful misconduct on the part of the consignee was covered by the policy; (ii) the defendants did not plead that the lighterman was the agent of the consignee, but even if it was, it would not matter unless the lighterman had been guilty of wilful misconduct, and (iii) the loss must be fortuitous. It was contended for the defendants: (a) that the plaintiffs' claim is not maintainable because by the terms of the policy each of the seven cases comprising the original consignment were not separately insured; (b) that clause 6 of the Institute Cargo Clauses (W.A.) must be construed in two parts, the first 3 lines first and then the rest; (c) the contract could not be severed by arithmetical calculation by virtue of the fact that the various cases were of different weights; (d) that as the loss occurred after discharge clause 4 of the Institute Cargo Clauses (W.A.) was operative at the time of the loss and it is incumbent upon the plaintiffs to show that the loss was due to a peril of the sea; (e) loss or damage must be fortuitous not only in relation to a particular person who might have an interest in the policy but all.

Held: (1) as the value per kilogramme of the Swallow Nests together with the weight of each of the cases were known, the value of individual cases which had been lost was a matter simply of arithmetical calculation, that is to say separability was merely a matter of arithmetic;

(2) clause 6 of the Institute Cargo Clauses (W.A.) could not be split up in the manner urged by the defendants. What that clause states is that in addition to and in extension of the provisions of the formal parts of the policy there shall be these additional risks which are risks beyond the perils of the sea;

(3) clause 4 covers the situation where there has been transhipment due and is not applicable to this case.

Observations on principles of construction of marine insurance policies.

Case referred to:—

(1) *Ralli* v. *Janson* 119 E.R. 922.

CIVIL SUIT.

H. E. Cashin (*Tan Lye Huat* with him) for the plaintiffs.

M. Karthigesu for the defendants.

Cur. Adv. Vult.

Hepworth J.: The plaintiffs' claim against the defendants, as the insurers of a cargo of 7 cases of Siam Swallow Nests, is for the sum of $64,820.20, the value of 3 of such cases which were lost in the circumstances hereinafter appearing.

At the commencement of the hearing Mr. Cashin on behalf of the plaintiffs took objection to the defence as it stood with the result that parts of it were, with the agreement, after argument, of Mr. Karthigesu on behalf of the defendants, struck out under Order 19 rule 27. In addition a small amendment was permitted, with Mr. Cashin's approval, to paragraph 4 of the defence. The result of this is that substantially the whole of the facts alleged in the statement of claim are in effect not contested by the defence and consequently sufficient is admitted on the pleadings to obviate the plaintiffs calling any evidence. What remain to be decided are matters of law.

The facts are as follows. The plaintiffs are and were at all material times fully interested in a "Warehouse to Warehouse" Policy of Marine Insurance No. 2-234490-17 made between the defendants and Messrs. Chin Take Chiang of Bangkok, Thailand, whereby the defendants insured 7 cases of Siam Swallow Nests packed in the usual customary packings valued at $127,600 in the steamer *s.s. Hock Lee* at and from Bangkok, Thailand, to Penang, Malaya, on terms printed on the said policy. The said goods were duly shipped in the said steamer at Bangkok, Thailand, for carriage to Penang, Malaya, under a Bill of Lading dated the 9th April, 1961, and duly arrived at Penang. On the 14th April, 1961, in the evening around 6.30 p.m. the said 7 cases of Siam Swallow Nests together with other general merchandise were discharged from the *s.s. Hock Lee* anchored in the Penang roads into Lighter No. PC. 748 for delivery to the plaintiffs. The lighter completed loading at about 9.30 p.m. and was making way for other lighters to come alongside the *s.s. Hock Lee* when it knocked against the side of the steamer. The waves of the sea were the cause of the collision. The impact of the collision caused the said 3 cases of Siam Swallow Nests together with 6 bags of tapioca waste to fall into the sea. None of the said 3 cases of Siam Swallow Nests could be retrieved.

The plaintiffs' claim is for the value of these 3 cases which became a total loss, such loss being caused by one or more of the perils insured against under the said policy.

The defendants allege that the loss was not due to the perils insured against. They plead first of all that the loss was caused by the negligence of the lighterman and his crew of Lighter No. PC. 748 in circumstances which were not caused or proximately caused by any of the perils insured against, and secondly, in the alternative, that the plaintiffs' claim is not maintainable as by the terms of the said policy each of the 7 cases comprising the original consignment was not separately insured.

It is submitted on behalf of the plaintiffs that it does not matter whether the lighterman was negligent or not. They concede that there was no wind at the operative time and that the sea was calm. It is their case, which is not contested by the defendants, that the waves referred to by them in the statement of claim as being the cause of the collision were waves caused by a passing steamer. But they submit that it does not matter whether the waves were mountainous or not. The plaintiffs submit that

the decision that is required in this case is whether the said cases were on risk under the clauses of the policy at that time and that this is a matter of construction and therefore a matter of law.

A contract of marine insurance is defined by the Marine Insurance Act, 1906, as a contract whereby the insurer undertakes to indemnify the assured in manner and to the extent thereby agreed against marine losses, that is to say, losses incident to marine adventure. The most usual insurances are on ship or goods, freight or profits. The policy with which we are concerned effects insurance on goods.

The forms of marine policies are numerous, but almost all policies effected in the United Kingdom are framed on the model of a policy, known generally as the S.G. Form (Shipped Goods), which is recognised in and scheduled to the Marine Insurance Act, 1906, and its wording has been changed comparatively little over the years. This policy form can be used basically for every kind of marine insurance. Marine insurance is, however, essentially international and consequently a wide diversity of "adventures" needs to be protected. It is in order to adapt the standard form of policy to meet all these and many other insurance requirements that such a wide diversity of clauses is required. Standardisation of such clauses early became apparent and in the present day the publication of the standard clauses remains the responsibility of the Institute of London Underwriters. As a result of this various Institute Clauses have come into being.

Generally speaking the four most usual types of cargo marine insurance are:—

(a) T.L.O. (Total Loss Only). Before any claim will be paid the insured interest must be proved to have been totally lost by one of the maritime perils insured against.

(b) F.P.A. (Free From Particular Average). The actual effect of the F.P.A. warranty is to exclude liability for partial damage to the insured interest unless the vessel or craft be stranded, sunk or burnt. The total loss of a complete package during loadings, transhipment or discharge is however recoverable under a policy with Institute Cargo Clauses (F.P.A.) attached.

(c) W.A. (With Average). This type of cover incorporates T.L.O. and F.P.A. and grants a fuller protection than the other two types as mentioned above. It includes partial damage caused by maritime perils and also covers General Average Claims.

(d) All Risks as *per* Institute Cargo Clauses.

A contract of marine insurance may, by its express terms, be extended so as to protect the assured against any land risk which may be incidental to a sea voyage and policies on goods often contain a "warehouse to warehouse" clause providing that insurance attaches from the time the goods leave the warehouse and/or store at the place named in the policy for the commencement of the transit and continues during the ordinary course of transit including customary transhipment, if any, until the goods are discharged overside from the overseas vessel at the final port. Thereafter the insurance continues whilst the goods are in transit and/or awaiting transit until delivered to final warehouse at the destination named in the policy. (*Halsbury's* Laws of England, 3rd Edition, Volume 22, page 58). The policy with which we are concerned is a "Warehouse to Warehouse" policy.

The policy with which we are concerned here is also subject to the Institute Cargo Clauses (W.A.) which were brought into being on the 1st January, 1958. These Institute Cargo Clauses (W.A.) go very much further than the clauses in marine insurance policies formerly did, for example, they cover perils other than perils of the sea. As a result of this prior cases on the meaning of clauses which were in existence prior to the 1st January, 1958, are of little assistance in construing these latest clauses and it appears that since the 1st January, 1958, there have been no reported cases upon the construction of the Institute Cargo Clauses (W.A.) of the 1st January, 1958.

There are, however, certain general principles of construction of marine policies, some of which are of assistance in this case. A contract of marine insurance is to be construed, like all other commercial instruments, so as to give effect to the intention of the parties as expressed in the written contract. The contract is to be construed as a whole. The most general rule of construction is that the policy is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, and these terms are to be understood in their plain, ordinary and popular sense, unless they have by the known usage of trade acquired a peculiar meaning distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense.

Greater weight is, in the case of inconsistency, given to a written or typewritten rather than to a printed clause, inasmuch as the written or typewritten words are the immediate language and terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects. Printed words will, therefore, be considered as struck out if they are completely inconsistent with the written or typewritten words, or if it is clear that the latter were to be in substitution for the former. For a similar reason no effect will be given to a printed clause in a policy where it is inconsistent with the object and purpose of the insurance.

Incorporation by reference of the terms of some other document similarly makes it clear that these are in substitution for the printed words where there is any inconsistency.

Finally, where an ambiguity cannot be removed by any other rule of construction the

maxim *verba chartarum fortius accipiuntur contra proferentem* is applied. It is, however, left for determination in each case, as regards any special provision in the policy, whether the assured or the insurers are to be considered the proferentes within the meaning of the rule. (*Halsbury's* Laws of England, 3rd Edition, Volume 22, page 18).

The policy with which we are concerned in this case is, as I have already stated, a "Warehouse to Warehouse" policy with, *inter alia*, the addition of the Institute Cargo Clauses (W.A.) of the 1st January, 1958. The formal part of the policy appears at pages 13 and 14 of Bundle "A". There are three matters of particular note on page 13, one being that all questions of liability arising under this policy are to be governed by the laws and customs of England, the second that this formal part of the policy is subject to, *inter alia*, the Institute Cargo Clauses (W.A.) of the 1st January, 1958, and the third are the provisions of the Recital which reads as follows:—

"WHEREAS it hath been proposed to this Company by Chin Take Chiang as well in his or their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described."

The parties really interested in the subject of the insurance are by virtue of the provisions of this Recital not generally described by name at all but are comprehended under the clause by which the insurance is expressed to be made by the person effecting it "as well in his or their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this policy does may or shall appertain in part or in all". Persons who may avail themselves of these terms must be persons, firstly, who may lawfully be insured, secondly, who at some time during the risk have an insurable interest in the property and thirdly, that the persons effecting the insurance either intended it for their benefit or at all events did not intend it exclusively for the benefit of others having conflicting or inconsistent interest but meant it to apply generally so as to cover the interests of those who should ultimately appear to be concerned. It is not contested by the defendants that the plaintiffs have an insurable interest in these goods and are entitled to make a claim under the policy.

On page 14 the final provision of the formal part of the policy reads as follows:—

"AND it is declared and agreed that Corn, Fish, Salt, Saltpetre, Fruit, Rice, Seeds, Hides, Skins and Molasses shall be and are warranted free from average unless general or the Ship be stranded, sunk or burnt or unless caused by collision with any other Ship or Vessel and that Sugar, Tobacco, Hemp and Flax shall be and are warranted free from average under Five Pounds per centum and that all other Goods and also Ship and Freight shall be and are warranted free from average under Three Pounds per centum unless general or the Ship be stranded, sunk or burnt."

The Institute Cargo Clauses (W.A.) to which the formal part of the policy is made subject appear at pages 8, 9 and 10 of Bundle "A". Of these clauses the only clauses with which we are immediately concerned are clauses 1 and 6.

Clause 1 reads as follows:—

"This insurance attaches from the time the goods leave the warehouse at the place named in the Policy for the commencement of the transit and continues until the goods are delivered to the Consignees' or other final warehouse at the destination named in the Policy. In no case however shall the period of cover after completion of discharge overside of the goods from the overseas vessel at the final port of discharge extend beyond 60 days."

It will be noted that it is the clear intention of the parties that the insurance shall continue "until the goods are delivered to the consignees' or other final warehouse at the destination named in the policy". The destination named in the policy is Penang.

Clause 6 reads as follows:—

"Warranted free from average under the percentage specified in the Policy, unless general, or the vessel or craft be stranded, sunk or burnt, but notwithstanding this warranty the Underwriters are to pay the insured value of any package which may be totally lost in loading, transhipment or discharge, also for any loss of or damage to the interest insured which may reasonably be attributed to fire, explosion, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at a port of distress.

"This Clause shall operate during the whole period covered by the Policy."

It will be seen that notwithstanding the warranty in the formal part of the policy already referred to the payment of the insured value of any package which may be totally lost in loading, transhipment or discharge is accepted by the insurer as an additional risk.

It is the plaintiffs' case that it does not matter what caused the accident. Short of wilful misconduct on the part of the consignee everything is covered and the defendants have not pleaded wilful misconduct on the part of anyone. Further the plaintiffs submit that it is not pleaded that the lighterman was the agent of the consignee, but even if it was, it would not matter unless the lighterman had been guilty of wilful misconduct. The defendants have merely pleaded that the lighterman and his crew were negligent and have not pleaded that they were guilty of wilful misconduct. Even if, the plaintiffs submit, the consignee or his agent were negligent, they are still covered.

There has never been any suggestion that any of the clauses in the policy were suggested by the plaintiffs and accordingly the policy must be construed against the persons drafting the contract, in this case the defendants.

It is conceded by the plaintiffs that the loss must be fortuitous. Here the loss is fortuitous, if looked at from the plaintiffs' point of view, and they submit it is immaterial whether the loss was fortuitous from the point of view of the consignor.

In his submissions on behalf of the defendants Mr. Karthigesu did not deal with the question of the negligence of the lighterman and his crew and its effect. He concentrated his arguments on the submission that the plaintiffs' claim is not maintainable because by the terms of the policy each of the 7 cases comprising the original consignment was not separately insured.

The argument on behalf of the defendant is that this was a valued policy, that all 7 cases shipped were valued at $127,600, and that no individual valuation of each case had been made. Reference to the Invoice at page 2 of Bundle "A", it is said, showed that the cases were of different net weights with the result that the individual value of each case would be different. It is argued that in these circumstances the loss was not one of individual cases but the partial loss of a whole consignment. Reference to the policy showed, it is submitted, that it is not separable and in order for the plaintiffs to succeed it must be shown that the policy was separable at the outset.

It is urged on behalf of the defendants that clause 6 of the Institute Cargo Clauses (W.A.) must be construed in two parts, the first three lines first and then the rest. Where there are separate packages and there is only insurance of the whole partial loss does not entitle them to recover. The words "to pay the insured value of any package" meant the package must have an insured value, whereas in this case the valuation is of the whole. In this case the contract could not be severed now by arithmetical calculation by virtue of the fact that the various cases were of different weights.

It is also urged on behalf of the defendants that the loss occurred after discharge and that accordingly clause 4 of the Institute Cargo Clauses (W.A.) was operative at the time of the loss and it is incumbent upon the plaintiffs to show that the loss was due to a peril of the sea.

It is further urged on behalf of the defendants that the loss or damage must be fortuitous not only in relation to a particular person who might have an interest in the policy but to all. It is submitted that you cannot have the position that a consignee could claim while a consignor could not because the loss was not fortuitous as far as the latter was concerned.

I must confess that I find considerable difficulty in following the reasoning behind the submissions made on behalf of the defendants.

In the first place page 1 of the Invoice (appearing at page 1 of Bundle "A") shows that the value of the Swallow Nests was $290 per kilogramme. On page 2 of the Invoice at page 2 of Bundle "A") the individual weight of each of the cases was shown. When formulating their claim against the defendants (at page 40 of Bundle "A") the plaintiffs specified to the defendants which of these cases had been lost and what the weight of each case was. The result is that the value of the individual cases which have been lost is a matter simply of arithmetical calculation, that is to say separability is merely a matter of arithmetic.

In the second place it does not appear to me that clause 6 can be split up in the manner urged by the defendants. The first part of the clause is merely repeating the warranty in the formal part of the policy and it then goes on to say that notwithstanding that warranty certain other risks are also covered. It seems clear to me that what clause 6 is saying is that in addition to and in extension of the provisions in the formal part of the policy there shall be those additional risks covered. None of these additional risks are marine insurance. The cover provided by the Institute Cargo Clauses (W.A.) of the 1st January, 1958, give a new and extended type of cover and the risks are not perils of the sea as known in the past as a term of art. These Institute Clauses are concerned with risks which are beyond the perils of the sea.

In the third place, as regards discharge, this policy is a "Warehouse to Warehouse" policy and, it seems to me, means what it says, that is to say that the cover extends from the warehouse at the place of embarkation to the warehouse at the place of disembarkation and that there is not a gap between the ship and the warehouse. In my view, discharge means discharge into warehouse. Clause 4 covers the situation where there has been transhipment due, for example, to deviation and is not applicable in this case.

The defendants quoted from *Halsbury's* Laws of England, but the particular quotation dealt with a "Total Loss Only" policy and not a "Without Average" policy. The defendants referred to the case of *Ralli* v. *Jansen* [1], but this case referred to a very old "Free From Particular Average" policy and in any event the wording of the particular policy in that case is not known.

I have gone into this question in some detail not because I think the construction of the operative clauses is a matter of any great difficulty but because of the complete absence of any authority on the interpretation of the Institute Cargo Clauses (W.A.) of the 1st January, 1958.

In my opinion the loss was due to the perils insured against and there will be judgment for the plaintiffs for $64,820.20 and costs.

Judgment for the plaintiffs.

Solicitors: *Tan Lye Huat & Co.; Allen & Gledhill, Singapore.*